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August 7, 2009

VIA HAND DELIVERY

The Honorable Anne K. Quinlan
Secretary
Surface Transportation Board
395 E. Street, S.W.
Washington DC, 20423

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Office of Proceedings

AUG 7 - 2009

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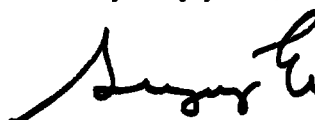
SURFACE
TRANSPORTATION BOARD

Re: Petition for Declaratory Order of ASARCO Incorporated and
Americas Mining Corporation
Docket No. FD 35286

Dear Secretary Quinlan:

Enclosed please find an original and ten (10) copies of the Petition for Declaratory Order of ASARCO Incorporated and Americas Mining Corporation. Also enclosed is a check for \$1,400.00 to cover the filing fee.

Very truly yours,


Gregory Evans

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SURFACE
TRANSPORTATION BOARD

Enclosures



BEFORE THE SURFACE TRANSPORTATION BOARD

ASARCO Incorporated and Americas Mining Corporation, Petitioners

DOCKET NO. FD 35286

**PETITION FOR DECLARATORY ORDER
OF ASARCO INCORPORATED AND AMERICAS MINING CORPORATION**

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**SURFACE
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**SURFACE
TRANSPORTATION BOARD**

ASARCO Incorporated and
Americas Mining Corporation

PETITIONERS

BEFORE THE SURFACE TRANSPORTATION BOARD

ASARCO Incorporated and Americas Mining Corporation, Petitioners

DOCKET NO. _____

**PETITION FOR DECLARATORY ORDER
OF ASARCO INCORPORATED AND AMERICAS MINING CORPORATION**

Petitioners, ASARCO Incorporated and Americas Mining Corporation hereby petition the United States Surface Transportation Board ("STB") for a Declaratory Order asserting the STB's jurisdiction over the proposed purchase and operation of the Copper Basin Railway ("CBRY") by Sterlite (USA), Inc. ("Sterlite"). Sterlite is a wholly owned subsidiary company created by its parent, Sterlite Industries (India) Ltd., for purposes of this purchase.

I. Background

Sterlite proposes to purchase and operate the CBRY, a regulated railroad operating in the United States, without STB review or approval. Sterlite is attempting to avoid STB scrutiny by purchasing the CBRY within the context of a larger asset purchase, now pending within the United States Bankruptcy Court.

In that case, *In re ASARCO LLC, et al.*, Case No. 05-21207, ASARCO LLC (the "Debtor") filed its voluntary petition for relief under Chapter 11 of Title 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Texas, Corpus Christi Division. ASARCO LLC is a fully integrated miner, smelter,

and refiner of copper in the United States, which remains in possession of its property and is operating its business as a Debtor-in-possession, pursuant to §§ 1107 and 1108 of the Bankruptcy Code. Among its many assets, ASARCO LLC currently owns and operates the CBRY, which operates in southern Arizona, including between ASARCO LLC's operating facilities in Arizona.

A. The CBRY

The CBRY's main line runs from Magma to Winkelman, Arizona, a distance of 54 miles. A branch line runs 7 miles, from Ray Junction to Ray, Arizona. The CBRY connects with the San Manuel Arizona Railroad (the "SMA") at Hayden, Arizona and handles SMA traffic from Hayden to interchange with the Union Pacific ("UP") main line track at Magma, Arizona.

The CBRY transports sulfide copper and copper concentrates from the Debtor's copper mining operations at the Ray Mine to the Hayden Smelter and also carries sulfuric acid in tank cars from the Hayden facility to the Debtor's leaching operations at the Ray Mine. The CBRY serves as an important conduit of raw materials or ore between these points. It also transports sulfuric acid in tank cars from the Hayden facility to the UP main line track for shipment on the UP to purchasers of this high grade sulfuric acid. The CBRY transports copper anodes and cathodes to Magma, Arizona, where they are transloaded onto other railcars for transportation to the ASARCO refinery in Amarillo, Texas.

In addition to the copper concentrates, ore, finished and unfinished copper, and sulfuric acid transported by the CBRY, the CBRY transported and may still transport

lumber and plastics for unrelated shippers, and military equipment for the United States Department of Defense and its contractors.

B. The Proposed Sale of the CBRY to Sterlite

As part of its effort to conclude its bankruptcy, the Debtor filed a proposed Sixth Amended Joint Plan of Reorganization for the Debtors Under Chapter 11 of the United States Bankruptcy Code, as Modified (the “Debtors’ Plan”). The Debtors’ Plan proposes to sell the Debtor’s operating assets – including the CBRY – to Sterlite, as memorialized in a Settlement and Purchase and Sale Agreement Among ASARCO LLC, AR Silver Bell, Inc., Copper Basin Railway, Inc., ASARCO Santa Cruz, Inc., Sterlite (USA), Inc. and Sterlite Industries (India) LTD (the “Purchase and Sale Agreement”), into which the Debtor entered in March 2009.

Under Federal law, Sterlite is required to submit the proposed purchase and related operations of the CBRY to the STB for approval. The concurrent purchase, sale, and operation of the CBRY is not permitted by law without STB approval. However, Sterlite proposes to operate the CBRY, by this sale, without seeking appropriate review by the STB. Sterlite asserts that the STB does not have jurisdiction over this transaction.

II. Relevant Law

The STB has exclusive jurisdiction over the transfer of ownership and operation of rail services between the owner or operator of that rail service and a non-carrier. *See* 49 U.S.C. 10901(a). The STB’s jurisdiction extends to the transfer of ownership and operation of smaller regulated railroads. *See* 49 C.F.R. § 1150 *et seq.*

The STB also retains jurisdiction over transactions where a proposed transferor of rail ownership and operations has filed for reorganization under the Bankruptcy Code.

See 49 C.F.R. § 1180.20; *see also In re Boston & Maine Corp.*, 484 F.2d 369, 372 (1st Cir. 1973) (noting that the bankruptcy code “does not contemplate that a court will make, as a matter of course, an unaided judgment on reorganizability before the [Interstate Commerce Commission (the “ICC”), predecessor agency to the STB] has considered the matter”); *In re Penn Cent. Transp. Co.*, 363 F. Supp. 1263, 1265 (E.D. Pa. 1973) (Prior to a bankruptcy court’s review of a plan of reorganization involving a regulated rail service, the ICC, now the STB, must review such a plan). Thus, because the STB’s jurisdiction is plenary - *even within the context of a bankruptcy* - there is no need for a prospective transferee of a railroad held by a bankrupt transferor to wait until the termination of bankruptcy proceedings to initiate STB approval processes.

Despite this clear mandate, Sterlite asserts that the STB has no jurisdiction over this purchase. Sterlite’s statements and its failure to initiate any sort of proceeding before the STB regarding its proposed purchase and operation of the CBRY indicates a complete disregard for the STB’s jurisdiction over the transaction.

As the STB is aware, a prospective railroad purchaser has an obligation to initiate proceedings before the STB whether or not the purchaser believes that the STB has jurisdiction. *See State of Maine*, 8 I.C.C. 2d 835, *6 (May 20, 1991). In *State of Maine* the ICC emphasized that jurisdictional questions are based upon specific facts of a transaction, and it cautioned that even seemingly minor rail purchases should be submitted for review so that it may accurately assess the facts and determine whether its jurisdiction is proper. *Id.*

Under 5 U.S.C. 554(e), the STB has broad discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty in the context of

railway transactions. *See Union Pacific Railroad Company – Petition for Declaratory Order*, STB Finance Docket No. 35219, * 3 (June 11, 2009) (citing *Boston & Main Corp. v. Town of Ayer*, 330 F. 3d 12, 14 n.2 (1st Cir. 2003)).

III. The STB Has Jurisdiction over the Proposed Transfer of Ownership and Operation of the CBRY between ASARCO LLC and Sterlite

It is beyond question that the STB has jurisdiction over the proposed transfer of ownership and operations of the CBRY. Sterlite apparently believes otherwise. Sterlite has and may continue to fail to seek appropriate review by the STB until a Declaratory Order is issued. It is important for the STB to assert its jurisdiction over this transaction because the purchase and operation of the CBRY by Sterlite presents a variety of important public interests, which interests are reviewed regularly by the STB, including environmental, union, and United States Department of Transportation (“DOT”) regulatory issues.¹

The STB has jurisdiction over the proposed purchase and operation of the CBRY from the Debtor to Sterlite. As Sterlite is a non-carrier, its proposed purchase and operation of the CBRY fall under the ambit of the 49 U.S.C. 10901(a) and supporting regulations, which require that it initiate proceedings for STB approval or exemption.

It is clear that under current ownership, the STB has asserted jurisdiction over this Class III Railroad. *See Class Exemption for Expedited Abandonment Procedure for Class II and Class III Railroads*, STB Ex Parte No. 647 (Jan. 19, 2006); *K. Earl Durden*,

¹ Moreover, as with all railroads, the CBRY’s operations also implicate the jurisdiction of the DOT, the DOT Federal Railroad Administration (the “FRA”) and the DOT Federal Highway Administration (the “FHWA”), where, as with the CBRY, highways and railroad intersect at the same grade. Further, specifically in Arizona, the Arizona Corporation Commission (the “ACC”), which assists the FRA in administering certain rail safety functions, also exercises regulatory authority over the railroads. The ACC also shares grade crossing safety responsibilities with the Arizona Department of Transportation (“ADOT”).

Rail Management Corporation, and Rail Partners, L.P.--Continuance in Control Exemption--Riceboro Southern Railway, L.L.C., STB Finance Docket No. 34252 (Sept. 2, 2004); *Class Exemption for Expedited Abandonment Procedure for Class II and Class III Railroads*, STB Ex Parte No. 647 (Aug. 13, 2003); *K. Earl Durden--Acquisition of Control Exemption-- Rail Partners, L.P.*, STB Finance Docket No. 32947 (June 27, 1996). It is equally clear that under current ownership, the CBRY is also regulated as a railroad by the Arizona Department of Transportation and subject to United States Railroad Retirement Board.² So, Sterlite's apparent claim that the STB has no jurisdiction or authority over its purchase is contrary to the readily available public record. The jurisdiction and regulation by other governmental agencies indicate that the CBRY is not simply a private, unregulated line; its operation, and any changes thereto may have an impact on interstate commerce and upon the public interest.

Additionally, a plan of reorganization does not eliminate or limit STB oversight over the railroad purchase by Sterlite. Here, regulations, enabling statutes, and case law prohibit Sterlite from using bankruptcy proceedings to shield acquisition of the CBRY from STB scrutiny. Thus, although Sterlite proposes to purchase the CBRY in the context of a Chapter 11 reorganization, Sterlite must nevertheless initiate proceedings before the STB.

Assuming, *arguendo*, that STB approval is not required for the purchase of the CBRY by Sterlite, the STB, and not Sterlite, must make this determination. See *State of Maine*, 8 I.C.C. 2d 835, *6 (May 20, 1991). Sterlite must file with the STB and submit

² See Arizona Department of Transportation, 2007 Railroad Inventory and Assessment, accessible at http://mpd.azdot.gov/transit/PDF/FINAL_2007_AZ_RR_Inv_Assess.pdf; see also U.S. Railroad Retirement Board, Statistical Notes, 2009, accessible at <http://www.rrb.gov>.

information to allow the STB, in the exercise of its plenary and exclusive jurisdiction, to make a proper review of the proposed sale.

Documents produced in discovery state that Sterlite does not believe that STB approval is necessary. Therefore, without an order of the STB declaring its jurisdiction in this circumstance, Sterlite will continue to pursue this purchase without the required review of the STB. For example, the closing checklist to the Purchase and Sale Agreement contains a statement that STB approval of the CBRY transfer is “not necessary.”³

IV. Conclusion

Sterlite is not immune from STB review of its proposed purchase of the CBRY. It must initiate proceedings before the STB to satisfy requirements under the Interstate Commerce Act. The STB has and should assert its jurisdiction over this proposed railroad purchase and operation. Until now, Sterlite refuses to acknowledge the STB’s authority. It is not in the public interest to allow Sterlite to ignore the STB’s jurisdiction over this purchase. It is respectfully requested, therefore, that the STB issue a Declaratory Order announcing its jurisdiction over the CBRY purchase by Sterlite.

³ Project Centaur Closing Checklist, BB Comments. July 1, 2008, at 6. This document was obtained from Debtor through Discovery associated with the confirmation hearing.

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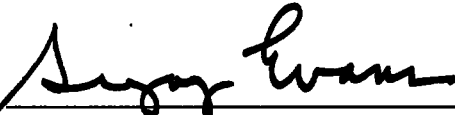
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*Counsel for Americas Mining Corporation and
ASARCO Incorporated*

VERIFIED STATEMENT

I, Gregory Evans, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this pleading.

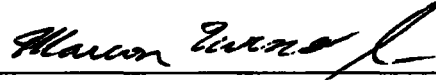
Executed on August 6, 2009

By: 

Gregory Evans

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the above and foregoing document by personal service on this 7th day of August, 2009 on all parties of record in this proceeding.

A handwritten signature in cursive script, appearing to read "Marion Turner, Jr.", is written over a horizontal line.

Marion Turner, Jr.